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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1106

UNITED MINE WORKERS OF AMERICA,
Petitioner

v.

JOSEPH A. YABLONSKI, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, West Virginia 25301

Counsel for Petitioner, United Mine Workers of America

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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IN THE

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OCTOBER TERM, 1971

No. _____

UNITED MINE WORKERS OF AMERICA,
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v.

JOSEPH A. YABLONSKI, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America prays that a Writ of Certiorari issue to review (1) the Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit issued and entered on November 24, 1971, in Case No. 24,945, styled *Joseph A. Yablonski, et al., Appellants* v. *United Mine Workers of America* (A. 1-12a);[1] and (2) the Order denying

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[1] The abbreviation "A. ____" refers to pages in the Appendices to this Petition.

UMWA's petition for rehearing *en banc* entered on January 3, 1972 (A. 12a).[2]

OPINIONS BELOW

On August 27, 1971, the district court denied a motion by Respondents to disqualify house counsel of Petitioner UMWA (A. 13a); but the district court issued no opinion.

The Opinion of the District of Columbia Circuit, dated November 24, 1971, which UMWA seeks to have reviewed, appears in Appendix A hereto (A. 1-12a) and is reported in 78 LRRM 2911. Its earlier Opinion, dated July 21, 1971, appears in Appendix B hereto (A. 13-25a) and is reported in 448 F.2d 1175.

JURISDICTION

The District of Columbia Circuit's Judgment was entered November 24, 1971 (A. 12a). A timely petition for rehearing was denied on January 3, 1972 (A. 12a)[3] and this Petition for Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Does a federal appellate court decree which denies to a labor union the right to be represented in litigation by attorneys of its choice, namely, its house counsel,

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[2]Herein the United States Court of Appeals for the District of Columbia Circuit is called "District of Columbia Circuit"; the United States District Court for the District of Columbia, "trial court" or "district court"; United Mine Workers of America, "UMWA" or "Petitioner"; and Joseph A. Yablonski, et al., "Respondents".

[3]The District of Columbia Circuit's denial order of January 3, 1972 was accompanied by a letter from that Court's Clerk stating:

"You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon"

and

"In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for rehearing *en banc*."

conflict with rights guaranteed under the First Amendment to the Constitution of the United States?

2. Where, upon appeal, a federal appellate court disqualified an outside law firm representing a labor union and remanded the case for further proceedings and thereafter, following the law firm's withdrawal, the labor union's house counsel appeared to represent it and the district court refused to disqualify them after hearing a motion to do so, and the losing movant did not appeal but sought a writ of mandamus under the All Writs statute (28 USCA 1651), did the appellant court commit reversible error, under the circumstances of the instant case, (1) in employing the All Writs statute as a substitute for the appeals process and issuing the writ of mandamus herein, and (2) in holding that the order refusing to disqualify house counsel is appealable?

3. Did the appellate court's issuance of its writ of mandamus under the All Writs statute, under the circumstances of the instant case, invade the discretionary power accorded the district court and violate Rule 52(a), Federal Rules of Civil Procedure, providing that findings of fact shall not be set aside unless clearly erroneous?

4. Does the record, under the circumstances of the instant case, warrant the appellate court's issuance of the writ of mandamus and reversal of the district court's order which denied disqualification of the labor organization's house counsel?

STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Statutory provisions involved are Section 501, Labor-Management Reporting and Disclosure Act of 1959 (29 USCA 501) [called "Act"]; the All Writs statute (28

USCA 1651); 28 USCA 1292(a) and (b); as well as Federal Rules of Civil Procedure, Rule 52(a). Relevant portions of the statutes appear in Appendix C (A. 27 et seq.).

STATEMENT OF THE CASE

A. KIND OF ACTION.

Joseph A. Yablonski (now deceased) and 48 other members of UMWA instituted the instant action under the Act's Section 501(b) against UMWA and its resident officers, W. A. Boyle, George J. Titler and John Owens, individually, and as President, Vice President and Secretary-Treasurer, respectively, asking for an accounting of UMWA funds disbursed by them and for restitution of funds allegedly misappropriated and misspent (A. 13-14a).

1. Procedural Facts Involved.

a. Prior disqualification of a law firm as UMWA counsel.

Following the action's institution in December, 1969, Respondents filed a motion to disqualify outside counsel on grounds that UMWA counsel's compensation would continue to come from UMWA's treasury and there existed a conflict between UMWA and the individual defendant officers. Subsequently, UMWA outside counsel withdrew its representation of the officers and other outside attorney entered his appearance for them, which the district court sustained as proper (A. 14a).

Upon *appeal* by Respondents, the District of Columbia Circuit (per Circuit Judges McGowan, Robinson and Wilkey), on July 21, 1971, reversed the district court and disqualified outside counsel from representing UMWA because the law firm involved represented President Boyle individually in sundry facets of activities as a UMWA officer, as a trustee of the UMWA Wel-

fare and Retirement Fund, and as a director of a bank owned 74 per cent by UMWA (A. 18a) and because the public interest required that validity of "charges against the UMWA management of breach of its fiduciary responsibilities be determined in a context which is as free as possible from the appearance of any potential for conflict of interest in the representation of the union itself" (A. 20a).

Though recognizing that any counsel selected to represent UMWA would be selected by President Boyle and would be, to some degree, under his control, the District of Columbia Circuit noted "But such counsel will still only have one client—the UMWA—to represent in matters growing out of the union affiairs", but "Such counsel would never be professionally obligated to consider Boyle's personal interest, because they would not be representing him individually in related matters" and, further, "the extent of their labors would be gauged by the need to protect the UMWA position in this litigation" (A. 25a).

The District of Columbia Circuit stated (A. 25a):

> "Therefore, the Order of the District Court denying the appellants' motion to disqualify the regular UMWA outside counsel from representing the UMWA in this particular action is vacated, and the cause remanded to the District Court for further proceedings in accordance with this opinion."

Subsequently, upon the District of Columbia Circuit's issuance of its mandate to the district court remanding the case for further proceedings in accordance with the Court's opinion, outside counsel promptly withdrew (A. 2a).

b. UMWA's house counsel appear as UMWA's counsel; Respondents move to disqualify them; and the district court's refusal to disqualify.

Thereafter, UMWA's house counsel (Edward L. Carey, Harrison Combs, Willard P. Owens and Charles L. Widman) entered appearances for UMWA (A. 2a)[4] Carey, as house counsel has been UMWA's general counsel since 1966, and Combs, Owens and Widman have been of house counsel since 1941, 1948 and 1969, respectively. Respondents moved for an order disqualifying house counsel, which the district court denied on August 27, 1971, after hearing (A. 2a).

c. Respondents did not appeal the district court's refusal to disqualify house counsel. Respondents filed a Petition for Further Relief to Enforce the District of Columbia Circuit's Prior Opinion and Mandate, which was granted.

Circumventing the appellate procedures afforded by 28 USCA 1292(a) and (b) [A. 27a], Respondents filed in the District of Columbia Circuit their "Petition for Further Relief to Enforce this Court's Prior Opinion and Mandate" under the All Writs statute (28 USCA 1651) [A. 27a]. The District of Columbia Circuit's Opinion (per Circuit Judges McGowan, Robinson and Wilkey) of November 24, 1971 granted Respondents' Petition, agreeing that the district court's refusal to disqualify UMWA's house counsel was properly characterized by Respondents "as a failure to give full effect to the mandate" of the District of Columbia Circuit following its July 21 Opinion (A. 2a).

Rejecting UMWA's objections that the appellate court lacked jurisdiction to consider the Petition, the District of Columbia Circuit held the challenged district court

[4] In addition, Walter E. Gillcrist, now deceased, also entered his appearance as UMWA house counsel (A. 7a, fn. 31).

order to be "appealable", conceding *"the instant order has not been subjected to an appeal"* (A. 3a)[5]. Instead, as the Court noted, Respondents "seek summary relief allegedly needed to exact compliance with the mandate" and perceiving "nothing removing the order under attack from the mainstream of mandamus doctrine", the District of Columbia Circuit held "A trial court 'is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case' " and that "it is well settled that mandamus lies to rectify a deviation" (A. 3a). Though admitting "only exceptional circumstances *amounting to a judicial 'usurpation of power'* will justify" *mandamus*, the District of Columbia Circuit *ignored* that its July 21 mandate pertained to *outside counsel*, that UMWA's choice of house counsel and its appearance by house counsel did not eventuate until after outside counsel's withdrawal (A. 4a). The District of Columbia Circuit failed to take into account and totally ignored the fact that the district court's denial on August 27, 1971 of the disqualification motion followed a hearing in which the district court stated:

> "Well until you can demonstrate more clearly to me that Mr. Carey's participation in this case is improper or that there is a conflict of interest or that he could in some way adversely affect the conduct of the case, he is simply house counsel and I do not read the Court of Appeals Opinion as saying that because he is house counsel he cannot therefore represent the passive defendant and this is a passive defendant."[6]

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[5]Unless otherwise indicated, all emphases herein are supplied.

[6]The above-quoted matter appears in Respondents' "Petition for Further Relief To Enforce This Court's Prior Opinion and Mandate", as footnote 9 on pages 14-15, filed in the District of Columbia Circuit in Case No. 24,945.

The District of Columbia Circuit justified its grant of mandamus and the district court's refusal to disqualify house counsel on the basis that "It seems just as clear that the circumstances may be extraordinary when an attorney plainly disqualified by standards articulated in a prior appellate judgment is nonetheless permitted to function as counsel in the litigation" (A. 4a).

Noting that the Court's July 21 Opinion pointed out that "representation of a labor union by counsel free of possibly conflicting obligations to adverse parties is directly related to attainment of the goals Congress envisioned when it passed" the Act and that "Consequently, 'if the order [denying disqualification] was in error, the harm resulting therefrom is in the nature of the frustration of a public policy which cannot be avoided or mitigated by any appeal taken after the trial, with [counsel] participating, is finally ended' ", the District of Columbia Circuit concluded, "we possess jurisdiction to entertain appellants' petition, and to afford relief if the showing it makes demands" (A. 4-5a).

In rejecting UMWA's house counsel and holding "They simply are not 'unquestionably independent new counsel' whose contemplated appearance would enable resolution of the issues 'in a context which is as free as possible from the appearance of any potential for conflict of interests in the representation of the union itself' ", the District of Columbia Circuit premised its rejection and holding upon the facts that "UMWA general counsel and three members of his staff are representing or have represented to some extent union officers who are accused of wrongdoing in this case", that "One staff member is the son of one of such officers, and another is the son of a nonparty officer whom the charges conceivably could

implicate", and that "Atop that, three of the five attorneys are themselves named in appellants' complaint as recipients of payments allegedly made by officers in breach of fiduciary duties" (A. 7a). The District of Columbia Circuit concluded that "the license the District Court gave them to remain union counsel is a grave departure from the terms of our prior mandate, and sounds the call for corrective action here" (A. 7-8a).

The District of Columbia Circuit's disagreement with the district court's refusal to disqualify UMWA house counsel focused upon the trial court's belief that "'a passive role' was in store for UMWA" and that the "court was not at liberty to utilize as ground for a fresh determination a consideration" the "earlier decision had already implicitly discarded" (A. 8a).

While the District of Columbia Circuit declared "there is no predicate for a present assumption that UMWA must or will remain an inactive party" and that "UMWA may, but is not inexorably bound to, take and maintain a detached position on the merits" (A. 8a), cogently, the district court, as noted (*ante*, p. 7), found that Respondents had not demonstrated that "Carey's participation in this case is improper or that there is a conflict of interest or that he could in some way adversely affect the conduct of the case".

Though the District of Columbia Circuit seemingly rejected that "house counsel can never be permitted to represent a union" in a Section 501 action and denied that "cordiality normally exchanged between union executive and house counsel necessarily works a disqualification", its expressed guideline for permissible union representation is "the absence of any duty to another that might detract from a full measure of loyalty to the wel-

fare of the union"—a test which the District of Columbia Circuit believed UMWA house counsel "plainly do not" meet (A. 10-11a). Although, as noted (*ante*, p. 7), the district court's refusal to disqualify house counsel was contingent upon Respondents' showing of a conflict of interest, or a showing of conduct adversely affecting the case, the District of Columbia Circuit characterized the district court's refusal as "manifestly in the teeth of the definitive rulings we made when the case was first here" and that Respondents' "right to relief assuring conformance with our prior mandate is clear and indisputable" (A. 11a).

d. The District of Columbia Circuit denied UMWA's rehearing petition.

UMWA filed a timely Petition For Rehearing and Suggestion For Rehearing En Banc, which the District of Columbia Circuit denied on January 3, 1972 (A. 12a).

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT OF COLUMBIA CIRCUIT'S OPINION AND JUDGMENT DISQUALIFYING UMWA HOUSE COUNSEL VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND CONFLICT WITH PRIOR OPINIONS OF THIS COURT AND THEIR RATIONALE.

On at least three occasions this Court has declared that selection of counsel by associations, and in two of them by labor organizations, was protected activity under the First Amendment's guarantees of free speech, petition, and assembly. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Bro. of Rr. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); and *UMWA, District 12* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967). Sharply contrasting with the District of Columbia Circuit's disqualifying UMWA's house counsel in the instant

case and thus depriving UMWA of counsel of its choice is this Court's recognition in *Bro. of Rr. Trainmen* (377 U.S. 6) that the right of union members "to consult with each other in a fraternal organization necessarily *includes the right to select a spokesman from their number who could be expected to give the wisest counsel*" and that "most importantly, *what lawyer* a member could confidently rely on—*is an inseparable part of this constitutionally guaranteed right to assist and advise each other*" (p. 6).

Further, in total opposition to the instant disqualification of UMWA house counsel because of what the District of Columbia Circuit characterized as "*potential* for conflict of interest" (A. 6a) is this Court's holding in *Illinois State Bar Assn.* (389 U.S. 223) that:

> "*We held the dangers of . . . conflicting interest between the association and individual litigants* invoked by the State, a remedy that would have *far too speculative* to justify the broad remedy seriously crippled the efforts of the NAACP to vindicate the rights of its members in court".

Similarly conflicting with the District of Columbia Circuit's instant opinion are this Court's further holdings in *Illinois State Bar Assn.* (389 U.S. 223-24) that:

> "Likewise in the *Trainmen* case there was a *theoretical possibility that the union's interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred,* the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interests of his client. *Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen's efforts to aid one*

> *another in assuring that each injured member would be justly compensated for his injuries",*

and that

> "Nor can the case at bar be distinguished from the *Trainmen* case in any persuasive way. Here, to be sure, the attorney is actually paid by the Union, not merely the beneficiary of its recommendations. But in both situations the attorney's economic welfare is dependent to a considerable extent on the goodwill of the union, *and if the temptation to sacrifice the client's best interests is stronger in the present situation, it is stronger to a virtually imperceptible degree. In both cases, there was absolutely no indication that the theoretically imaginable divergence between the interests of the union and member ever actually arose in the context of a particular lawsuit;* indeed in the present case the Illinois Supreme Court itself described the possibility of conflicting interests as, at most 'conceivable.' "

Since each of the cited cases involved, as does the instant one, the rights of union members, albeit union officers who, pertinently, are represented by *independent outside counsel*, this Court's rejection of a "*potential* for conflicts of interest" that constituted subversion of constitutional rights accentuates the need of review of the District of Columbia Circuit's judgment and opinion herein by issuance of the instant writ.

While the constitutional issue was not raised originally in the District of Columbia Circuit, in UMWA's Petition For Rehearing (p. 4) it asserted that the Court's opinion and judgment violate the First Amendment to the Constitution of the United States and conflict with prior Supreme Court decisions and their rationale.

II. THE DISTRICT OF COLUMBIA CIRCUIT'S HOLDING THAT IT HAD JURISDICTION TO GRANT THE INSTANT PETITION CONFLICTS WITH PRIOR DECISIONS OF THIS AND OTHER FEDERAL APPELLATE COURTS.

A. This Court and Other Federal Appellate Courts Have Rejected the All Writs Statute As a Substitute for Appeals.

Conflicting with the District of Columbia Circuit's award of mandamus in the instant case, and supportive of UMWA's contention that the appellate court was without jurisdiction herein, is this Court's holding in *Will v. United States*, 389 U. S. 90 (1967) that mandamus against a lower court may never be employed *as a substitute for appeal*. *Accord: Allstate Ins. Co. v. U. S. Dist. Ct.*, 6 Cir., 264 F.2d 38 (1959); *In the Matter of Warren E. Buckley, etc.*, 6 Cir., 395 F.2d 385 (1968).

Indeed, the District of Columbia Circuit herein properly recognized that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy" (A. 4a). Declaring issuance of the mandamus writ under the All Writs Act to have been "inappropriate" in the "circumstances" of the case in *Bankers Life & Casualty Co. v. Holland, as Chief Judge, etc.*, 346 U.S. 379, 382-83 (1953), this Court emphasized that mandamus does not lie merely because a district judge committed reversible error, as long as his ruling on a question of law was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. *Accord: Will v. U. S.* (389 U. S. 104).

Notably, the District of Columbia Circuit did not claim any usurpation of power on the district court's part but, instead, erroneously employed the extraordinary writ "to correct a misconception of the scope and effect of"

its July 21, 1971 decision (A. 3a). Yet, that Opinion and Mandate expressly described "The issue on this appeal" as "whether the law firm regularly representing the UMWA, who originally entered an appearance for the UMWA and the three individual officer-defendants, should be allowed to continue its representation of the UMWA after it withdrew as counsel for the individual defendants" and "we hold that in the particular circumstances of this case such representation should be discontinued" (A. 14a). Thereafter, and pursuant to the District of Columbia Circuit's July 21, 1971 Opinion and Mandate, the then-outside law firm regularly representing UMWA in the district court withdrew as such counsel (A. 2a).

The current proceeding involved a wholly different issue and related to UMWA house counsel who made no appearance for UMWA until *after* outside counsel had withdrawn (A. 2a) and whether the district court erred in rejecting Respondents' objections to representation by UMWA house counsel. It may not be gainsaid the district court had jurisdiction to consider and determine the propriety of UMWA being represented by attorneys of its choice, namely, its house counsel. Neither the District of Columbia Circuit nor Respondents contend the trial court lacked jurisdiction. The Eighth Circuit's *Thornton v. Carter*, 109 F.2d 316 (1940) [cited in the instant Opinion, A. 3a, fn. 11] affirms the existence of jurisdiction in holding that:

> "A mandate is completely controlling as to all matters within its compass, *but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal.*"

Even if the district court erred in rejecting disqualifica-

tion—which Petitioner denies, *Bankers Life* records that "jurisdiction need not run the gauntlet of reversible errors" and "Its decision against petitioners, even if erroneous—*which we do not pass upon—involved no abuse of judicial power*" (346 U.S. 382).

Since indisputably the district court's order refusing to disqualify UMWA house counsel was interlocutory and not final, relevantly *Bankers Life* holds that (346 U.S. 382-83):

> "If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act"

and

> "The office of a writ of mandamus would be enlarged to actually control the decision of the trial court *rather than used in its traditional function of confining a court to its prescribed jurisdiction.*"

This Court should reject the instant case as one involving usurpation of judicial power, just as it did in *Bankers Life* (346 U. S. 383).[7]

B. The District of Columbia Circuit Was Without Jurisdiction Also Because the District Court's Order of which Respondents Complain Is Interlocutory and Not Appealable.

Although the District of Columbia Circuit conceded "the instant order has not been subjected to an appeal",

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[7] Since the Court of Appeals' writ of mandamus was vacated in *Wills* v. *U.S.*, 389 U.S. 90, it does not support the District of Columbia Circuit's citation of it to support its issuance of mandamus (A. 4a, fn. 18). *De Beers Consol. Mines.* v *U.S.*, 325 U.S. 212, 223 (1945) indicates that "the injunction issued . . . is not authorized either by statute or by the usages of equity".

Similarly inapposite are the appellate court's citations of *United States* v. *Haley*, 371 U.S. 18 and *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) [A. 3a, fn. 13] since, unlike the instant case wherein the district court's jurisdiction is not a critical factor, in each of the cited cases the jurisdictional or other issue had been previously expressly proclaimed by the particular appellate court.

it nonetheless held that "the order now challenged was appealable" (A. 3a). In the appellate court UMWA argued that while 28 USCA 1292(a) accords federal courts of appeal jurisdiction concerning appeals from interlocutory orders of district courts *limited to injunctions*, the Ninth Circuit's *Cord v. Smith*, 338 F.2d 516 (1964) [cited in the November 24, 1971 Opinion, A. 3a, 4a] rejected the appealability of an order involving the supervisory power of federal courts over attorneys appearing before them and, noting (p. 521) the availability of an interlocutory appeal under Section 1292(b) if authority therefor is granted by the district court and the appellate court alike, emphasized that "the existence of this method of appeal also removes any incentive to enlarge by a liberal construction, the class of orders appealable under Section 1292(a)". Despite the District of Columbia Circuit's concession that "the instant order has not been subjected to an appeal", it nonetheless held—and UMWA says erroneously—that "the order now challenged was appealable" (A. 3a). It conceded, however, that "the cases have reached apparently conflicting conclusions where the disqualification was sought upon ethical considerations alone", and invited a comparison of a Fifth Circuit case[8] with those in the Second and Ninth Circuits;[9] but declared "The situation differs materially, however, where the disqualification was predicated additionally upon significant impingement on a specific legislative policy", citing *Tomlinson v. Florida Iron & Metal, Inc.*, 5 Cir., 291 F.2d 333, 334 (1961) and

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[8] *Uniweld Prods. Inc.* v. *Union Carbide Corp.*, 5 Cir., 385 F.2d 992, 994 (1967).

[9] *Marco* v. *Dulles*, 2 Cir., 268 F.2d 192 (1959); *Fleischer* v. *Phillips*, 2 Cir., 264 F.2d 515, 517 (1959); and *Cord* v. *Smith*, 9 Cir., 338 F.2d 516, 521 (1964).

"9 Moore, Federal Practice ¶ 110.13 [10] at 190 (2d ed. 1970)" (A. 3a, fn. 9).

Examination of the Court's reference to *Moore* discloses the author's discussion deals with "whether an order *denying a motion to disqualify* was appealable" as distinguished from one in which the district court *granted* a disqualification of counsel (p. 189). *Moore* recites further that "Without conceding the appealability of an order disqualifying counsel, Judge Clark vigorously dissented from the appealability of an order refusing to disqualify" and "In *Fleischer v. Phillips* he appeared to recognize the appealability of an order disqualifying counsel, *but prevailed with respect to an order refusing to disqualify*" (p. 189).

Moore also observes the Second Circuit's *Marco v. Dulles* reaffirmed *Fleischer "and indicated that immediate review of an order refusing to disqualify could be had only by way of 28 USC § 1292(b)"* (p. 189). Finalizing the conflict, *Moore* asserts "The view of the Second and Ninth Circuits seems clearly preferable" and "Questions of counsels' conflict of interest are almost invariably questions of fact best left to the trier of fact" and that "In the unusual case in which the denial of a motion to disqualify presents a novel question of law, 28 USC § 1292(b) is available, as is, in a truly exceptional case, mandamus" (p. 190). Since Congress has clearly evinced a policy against appellate review of an interlocutory order except as provided in Section 1292(b), and Respondents did not undertake to effect an appeal thereunder, *Moore* declares that "then the orders are not reviewable by prerogative writ" (p. 288).

In addition to showing that Respondents' right to mandamus relief was not "clear and indisputable", as the District of Columbia Circuit concluded (A. 11a), the foregoing discussion demonstrates not only a "conflict with applicable decisions of this court", as well as with decisions of other federal appellate courts, but also that the District of Columbia Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision", as provided for in this Court's Rule 19(b), and thus invites the award of certiorari herein.

III. THE DISTRICT OF COLUMBIA CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S REFUSAL TO DISQUALIFY UMWA HOUSE COUNSEL CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, THE DISTRICT OF COLUMBIA CIRCUIT, THE FOURTH CIRCUIT AND RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

The district court, exercising a discretionary power and based upon the hearing on Respondents' disqualification motion, rejected the motion because of Respondents' counsel's inability to demonstrate any conflict of interest (*ante*, p. 7), finding the factual predicate submitted by Respondents and employed by the District of Columbia Circuit herein (*ante*, p. 8) insufficient for disqualification.

Indeed, under Rule 52(a), Federal Rules of Civil Procedure, "Findings of fact shall not be set aside unless clearly erroneous".

Moreover, *Hudson v. Parker*, 156 U. S. 277 (1895) holds that the discretion of a judge is a matter entrusted by law to his judicial determination and cannot be controlled by a writ of mandamus. Recently, in *Will v. U. S.* (389 U. S. 104), this Court declared that mandamus'

"office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Accord: Petition of A & H Trans., Inc.*, 4 Cir., 319 F.2d 69 (1963), cert. den. 375 U. S. 924. Relevantly, the District of Columbia Circuit in *In re Texas Co.*, D.C. Cir., 201 F.2d 177, 179 (1952) declared that it "cannot invade any such discretion with the extraordinary writ of mandamus".

Demonstration in the foregoing discussion of the District of Columbia Circuit's conflict with the cited cases, UMW submits, warrants the award of certiorari herein.

CONCLUSION

For the reasons assigned, Petitioner prays that the Writ of Certiorari should be granted and that the Writ issue to review the Judgment, Order and Opinion of the District of Columbia Circuit entered in Case No. 24,945, complained of herein. Petitioner intends to urge each of the questions presented, even if not specifically argued herein.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, West Virginia 25301
Counsel for Petitioner,
United Mine Workers of America

February, 1972

APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,945

JOSEPH A. YABLONSKI, ET AL., APPELLANTS

v.

UNITED MINE WORKERS OF AMERICA

Petition for Further Relief to Enforce this Court's Prior Opinion and Mandate

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Decided November 24, 1971

Messrs. Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman, Joseph A. Yablonski and *Mrs. Clarice R. Feldman* were on the petition for appellants.

Mr. J. Gordon Forester, Jr., was on the opposition to the petition for appellees Boyle, Titler and Owens.

Messrs. Edward L. Carey, Harrison Combs, Willard P. Owens, Charles L. Widman, and *Walter E. Gillcrist* were on the opposition to the petition for appellee United Mine Workers of America.

Before McGOWAN, ROBINSON and WILKEY, Circuit *Judges.*

PER CURIAM: Last July 21 we held that a law firm retained by the United Mine Workers of America (UMWA) could not continue as its counsel in this case.[1] We did

[1] *Yablonski* v. *UMW*, No. 24,945 (D.C. Cir. July 21, 1971).

so because we found, in the firm's past and ongoing representation of UMWA's president in other litigation, the potential for conflict with obligations owing UMWA in this litigation.[2] In due course our mandate[3] issued to vacate the District Court's denial of a motion to disqualify the firm, and to remand the case for further proceedings in accordance with our opinion.[4]

Thereupon, the firm promptly withdrew, and UMWA's general counsel and all four members of his staff entered appearances on behalf of UMWA. Appellants immediately moved the District Court for an order disqualifying them, and the motion was denied. Appellants return here on a petition for further relief, characterizing the District Court's ruling as a failure to give full effect to the mandate.[5] We agree, and accordingly grant the petition.

I

We confront, at the outset, appellees' objection that we lack jurisdiction to consider the petition. It is contended that the District Court's order refusing disqualification of UMWA house counsel was interlocutory and, as such, nonappealable;[6] and the record, it is argued, does not show a clear and indisputable right to extraordinary relief under the All Writs Act.[7] Appellants, on the other hand, charge that the order flies in the face of our earlier mandate, and that mandamus is available to correct the asserted departures.[8]

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[2]*Id.* at 4-13.

[3]Conformably with Fed.R.App.P. 41(a), the mandate consisted of "[a] certified copy of the judgment and a copy of the opinion of the court. . . ."

[4]And see *Yablonski v. UMW*, *supra* note 1, at 4.

[5]See text *infra* at notes 11-14.

[6]See note 9, *infra*.

[7]28 U.S.C. § 1651 (1970).

[8]See text *infra* at notes 11-14.

We think the order now challenged was appealable, just as we felt its predecessor was on the prior appeal where, indeed, our jurisdiction was not seriously questioned.[9] The present situation differs, however, from the former because the instant order has not been subjected to an appeal.[10] Instead, appellants seek summary relief allegedly needed to exact compliance with the mandate, and the quest is valid if its underlying premise is. A trial court "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case,"[11] and it is well settled that mandamus lies to rectify a deviation.[12] That approach may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision,[13] or to prevent relitigation of issues already decided by the appellate court.[14] These are objectives to which appellants lay claim as justifications for action by this court at this time.

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[9] The cases have reached apparently conflicting conclusions where the disqualification was sought upon ethical considerations alone. Compare *Univeld Prods., Inc.* v. *Union Carbide Corp.*, 385 F.2d 992, 994 (5th Cir. 1967), cert. denied, 390 U.S. 921 (1968), with *Marco* v. *Dulles*, 269 F.2d 192 (2d Cir. 1959), and *Fleischer* v. *Phillips*, 264 F.2d 515, 517 (2d Cir.), cert. denied, 359 U.S. 1002 (1959). See also *Cord* v. *Smith*, 338 F.2d 516, 521 (9th Cir. 1959). The situation differs materially, however, where the disqualification was predicated additionally upon significant impingement on a specific legislative policy. *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F.2d 223, 224 (5th Cir. 1961). See also 9 Moore, Federal Practice, ¶ 110.13[10] at 190 (2nd ed. 1970). That, we think, is the situation here. See text *infra* at note 21.

[10] See text *supra* at note 4. Appellants might alternatively have achieved the same end—an expedited ruling here—by taking an appeal from the order and then moving in this court for summary reversal.

[11] *Thornton* v. *Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

[12] See, *e.g.*, the cases cited *infra* notes 13-14.

[13] *United States* v. *Haley*, 371 U.S. 18 (1962); *Baltimore & O. R.R.* v. *United States*, 279 U.S. 781, 785 (1929); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). See also *Erie Bank* v. *United States Dist. Ct.*, 362 F.2d 539 (10th Cir. 1966).

[14] *In re Potts*, 166 U.S. 263, 265-67 (1897); *Thornton* v. *Carter*, supra note 11; *Federal Home Loan Bank* v. *Hall*, 225 F.2d 349, 385 (9th Cir. 1955). See also *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 491 (1838).

We perceive nothing removing the order under attack from the mainstream of mandamus doctrine.[15] We are mindful, of course, that "[t]he peremptory common-law writs are among the most potent weapons in the judicial arsenal"[16] and that, "[a]s extraordinary remedies, they are reserved for really extraordinary causes."[17] We are mindful, too, "that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[18] We think, however, that appellants' petition presents a situation wherein relief in the nature of mandamus would be appropriate.

It is clear that the case may be sufficiently extraordinary for mandamus "where it [is] necessary to confine a lower court to the terms of an appellate tribunal's mandate."[19] It seems just as clear that the circumstances may be extraordinary when an attorney plainly disqualified by standards articulated in a prior appellate judgment is nonetheless permitted to function as counsel in the litigation. "Continued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation."[20] That, we believe, is the more so in the case at bar. As our first opinion pointed out, representa-

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[15] *See Cord* v. *Smith*, *supra* note 9, 338 F.2d at 521-22.

[16] *Will* v. *United States*, 389 U.S. 90, 107 (1967).

[17] *Ex parte Fahey*, 332 U.S. 258, 260 (1967).

[18] *Will* v. *United States*, *supra* note 16, 389 U.S. at 95 quoting *De Beers Consol. Mines* v. *United States*, 325 U.S. 212, 217 (1945).

[19] *Will* v. *United States*, *supra* note 16, 389 U.S. at 95-96. See also *United States* v. *United States Dist. Ct.*, 334 U.S. 258 (1948).

[20] *Cord* v. *Smith*, *supra* note 9, 338 F.2d at 521-22.

tion of a labor union by counsel free of possibly conflicting obligations to adverse parties is directly related to attainment of the goals Congress envisioned when it passed the Labor-Management Reporting and Disclosure Act of 1959.[21] Consequently, "if the order [denying disqualification] was in error, the harm resulting therefrom is in the nature of the frustration of a public policy which cannot be avoided or mitigated by any appeal taken after the trial, with [counsel] participating, is finally ended."[22] We conclude, then, that we possess jurisdiction to entertain appellants' petition, and to afford relief if the showing it makes demands.

II

We had thought that the factual basis for our earlier decision was evident from the circumstances we cited as relevant, and its legal basis equally so from the principles we identified as controlling. By the same token, we believed that we had furnished the District Court with unequivocal standards which successor counsel for UMWA would have to meet. We can explain the court's latest ruling on union counsel only as a misunderstanding of what our opinion and mandate really meant. As much for future as for present purposes, then, we briefly recapitulate our initial holding.

This suit, brought under Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959,[23] is for an accounting and restitution of allegedly misspent union funds. Joined as defendants and charged with the

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[21] *Yablonski* v. *UMW*, *supra* note 1, at 8-9, quoted in text *infra* at note 30.

[22] *Tomlinson* v. *Florida Iron & Metal, Inc.*, *supra* note 8, 291 F.2d at 334.

[23] 29 U.S.C. § 501(b) (1970).

expenditures are W. A. Boyle, UMWA's president, and two other UMWA officers. The firm originally appearing for UMWA had represented and was still representing Boyle in other lawsuits accusing him of misconduct in office. Appellants sought to disqualify the firm as union counsel, and the District Court upheld the arrangement.[24] On appeal, firm counsel insisted that UMWA's institutional interests and Boyle's individual interests were substantially the same[25]—a proposition we were unable to accept.[26] They saw no conflict in the dual representation—a matter on which we disagreed[27]—and gave assurances that if any arose they would withdraw as union counsel.[28] While recognizing that any conflict might well be ascertained in this fashion,[29] we concluded

> that the objectives of the Labor-Management Reporting and Disclosure Act would be much better served by having an unquestionably independent new counsel in this particular case. The public interest requires that the validity of appellants' charges against the UMWA management of breach of its fiduciary responsibilities be determined in a context which is as free as possible from the appearance of any potential for conflict of interests in the representation of the union itself.[30]

The record now reveals a new arrangement for union counsel which in final analysis does not differ essentially

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[24] During the first six months of the litigation, the firm had also represented the officers in this case as well, but ceased doing so when appellants' motion to disqualify was presented. We found, in the circumstances, no impropriety in that regard. *Yablonski* v. *UMW*, *supra* note 1, at 3.

[25] *Id.* at 11.

[26] *Id.* at 9-13.

[27] *Id.* at 6-9, 11-13.

[28] *Id.* at 6.

[29] *Id.* at 8.

[30] *Id.* at 8-9.

from the older. To be sure, some of the voluminous allegations the parties make are in apparent conflict, and in some particulars the general picture is obscure. Nevertheless, from the mass of data presented by the parties critical facts emerge sharply and without controversy. UMWA general counsel and three members of his staff are representing or have represented to some extent union officers who are accused of wrongdoing in this case.[31] One staff member is the son of one of such officers, and another is the son of a nonparty officer whom the charges conceivably could implicate. Atop that, three of the five attorneys are themselves named in appellants' complaint as recipients of payments allegedly made by officers in breach of fiduciary duties.

Considerably more is both charged and largely denied, but merely to recite only these several uncontested circumstances is to demonstrate satisfactorily that house counsel as a group[32] do not fit the specifications we previously laid down for those who would undertake representation of UMWA in this cause. They simply are not "unquestionably independent new counsel"[33] whose contemplated appearance would enable resolution of the issues "in a context which is as free as possible from the appearance of any potential for conflict of interests in the representation of the union itself."[34] It follows that the license the District Court gave them to remain union counsel is a grave departure from the terms of our

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[31]While the representation by others than the general counsel has usually been quite limited, two of the three staff members are those mentioned in the next succeeding text sentence, and the third is now deceased. See also note 32, *infra*.

[32]House counsel apparently contemplated representation as a group, but in any event none of them is completely free from the difficulties specified in text.

[33]See text *supra* at note 30.

[34]See text *supra* at note 30.

prior mandate, and sounds the call for corrective action here.[35]

III

The District Court's ruling on appellants' latest motion for disqualification appears to have been influenced primarily by the court's belief that "a passive role" was in store for UMWA in this case. The thought seemingly was that, irrespective of other factors, house counsel could function as counsel for UMWA as long as the latter's part in the litigation did not become aggressive. The short answer is that on that basis the law firm originally retained as union counsel was not disabled from continuing in that capacity. Our holding that it could not be permitted to do so necessarily ruled out the theory which the District Court saw fit to adopt.[36] The court was not at liberty to utilize as ground for a fresh determination a consideration which our earlier decision had already implicitly discarded.[37]

Perhaps more fundamentally, there is no predicate for a present assumption that UMWA must or will remain an inactive party. UMWA may, but is not inexorably bound to, take and maintain a detached position on the merits. To be sure, "as a general proposition, a labor organization should be kept in a neutral role when it can demonstrate no interest in the litigation beyond a shielding of officials whose activities are under attack;"[38] moreover, "even when permitted an adversary role, it should be limited to defenses designed to safeguard . . . institutional issues at stake."[39] That is because "those who for

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[35] See text *supra* at notes 11-14, 19-22.

[36] Compare *United States* v. *Haley*, *supra* note 13.

[37] See text *supra* at note 14.

[38] *Teamsters Int'l* v. *Hoffa*, 242 F.Supp. 246, 253 (1965).

[39] *Id.* (footnote omitted).

good cause bring and in good faith bear the brunt of the fight should be protected against harassment and oppression through the assertion of what are merely the defenses of the individual parties."[40] "At the same time," however, "the vital concerns of the organization in the litigation," if any it has, "must be recognized and given their just due."[41] UMWA "is free to say which side of a controversy involving a legitimate institutional interest it will take;"[42] and [i]t is for [UMWA], and not the Court, to determine its true position, and to say in which direction its advantage lies."[43] It is this very prerogative that makes it essential that UMWA have the benefit of "unquestionably independent . . . counsel"[44] to advise it on the legal aspects of the suit and thereafter, if desired, to represent it therein.[45]

Much of appellees' presentation is devoted to attempted justification of UMWA's representation by its house counsel on the ground that its institutional interests as a union coincide with the individual defensive interests of the officers who are sued.[46] That approach puts the cart before the horse. "Where, as here, union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by independent counsel, unencum-

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[40] *Id.* at 253-54.

[41] *Id.* at 254.

[42] *Teamsters Int'l* v. *Hoffa*, 52 CCH Lab. Cas. ¶ 16,634 at 23,518 (D.D.C. 1965).

[43] *Id.*

[44] See text *supra* at note 30.

[45] *Yablonski* v. *UMW*, *supra* note 1, at 7, 11.

[46] We can say as accurately here as in our earlier opinion we said of firm counsel there involved that "[c]ounsel's interpretation of the 'institutional interests' of the union appears to have been broad enough to authorize UMWA counsel to undertake practically everything worthwhile in the defense of this lawsuit." *Id.* at 9.

bered by potentially conflicting obligations to any defendant officer."[47] In our earlier opinion, we observed that "[i]n trying to achieve a valid definition of an institution's interests, it would seem that counsel charged with this responsibility should be as independent as possible."[48] We admonished that "counsel for the UMWA should be diligent in analyzing objectively the true interests of the UMWA as an institution without being hindered by allegiance to any individual concerned."[49] Even more emphatically we stated that "in the exploration and the determination of the truth or falsity of the charges brought by these individual appellants against the incumbent officers of the union and the union itself as a defendant, the UMWA needs the most objective counsel obtainable."[50] Only after satisfaction of these threshold requirements does counsel's assessment on identity of union and officer interests merit judicial consideration. And now, as before, "[e]ven if we assume the accuracy of the appellee's position at the present time that there is no visible conflict of interest, yet we cannot be sure that such will not arise in the future."[51]

Appellants' argument does not range so far as to suggest that house counsel can never be permitted to represent a union in a Section 501 action.[52] Nor does it harbor the thesis that the cordiality normally exchanged between union executive and house counsel necessarily works a disqualification. Our prior opinion drew the line when, speaking to a cognate point, we said:

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[47] *Teamsters Int'l* v. *Hoffa*, *supra* note 38, 242 F.Supp. at 256.

[48] *Yablonski* v. *UMW*, *supra* note 1, at 11.

[49] *Id.* at 7.

[50] *Id.*

[51] *Id.* at 7-8.

[52] See *Teamsters Int'l* v. *Hoffa*, *supra* note 42, 52 CCH Lab. Cas. ¶ 16,634 at 23,518-19.

> We are cognizant that any counsel to represent the UMWA selected by President Boyle will be to some degree under his control. But such counsel will still only have one client—the UMWA—to represent in matters growing out of the union's affairs. Such counsel would never be professionally obligated to consider Boyle's personal interests, because they would not be representing him individually in related matters.[53]

In sum, a *sine qua non* of permissible union representation in a Section 501 action is the absence of any duty to another that might detract from a full measure of loyalty to the welfare of the union. House counsel no less than outside counsel must survive that test.[54] In this instance, house counsel plainly do not.

The District Court's refusal to disqualify house counsel as union counsel in this case is manifestly in the teeth of the definitive rulings we made when the case was first here. By the same token, appellants' right to relief assuring conformance with our prior mandate is clear and indisputable.[55] We accordingly grant the petition, but in the belief that issuance of a formal writ is unecessary. We trade instead upon our confidence that without more

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[53] *Yablonski* v. *UMW*, *supra* note 1, at 13.

[54] Appellees' reliance upon *Teamsters Int'l* v. *Hoffa*, *supra* note 42, is misplaced. While the union there involved was permitted representation by one of its house counsel, we pointed out in our earlier opinion that that case "did not present a situation like that of the case at bar, where the regular union counsel seeks to represent the union in a 'derivative' action while at the same time representing in pending and related matters an individual officer charged in that action." *Yablonski* v. *UMW*, *supra* note 1 at 7 n.7. Nor in that case were there the professional and familial relationships or the individual involvements with the charges asserted that we find in the instant litigation.

[55] See, *e.g.*, *Will* v. *United States*, *supra* note 16, 389 U.S. at 96; *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953).

the District Court will now take action to rectify the error which gave birth to the present proceeding.[56]

Petition granted.

No. 24,945 **Filed November 24, 1971**

ORDER

On consideration of appellants' petition to enforce this Court's prior opinion and mandate, and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that the aforesaid petition is hereby granted to the extent set forth in the opinion of this Court filed herein this date.

Per Curiam.

No. 24,945 **Filed January 3, 1972**

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam
For the Court:
NATHAN J. PAULSON
Clerk

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[56]Compare, *e.g.*, *United States* v. *Haley*, *supra* note 13, 371 U.S. at 20; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.* 136 U.S.App.D.C. 230, 232, 420 F.2d 72, 74 (1969), *cert. denied*, 397 U.S. 1024 (1970).

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,945

JOSEPH A. YABLONSKI, ET AL., APPELLANTS

v.

UNITED MINE WORKERS OF AMERICA

Appeal from the United States District Court for the District of Columbia

Decided July 21, 1971

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Elliott C. Lichtman* and *Clarice R. Feldman* were on the brief, for appellants.

Mr. Paul R. Connolly, with whom *Mr. Edward L. Carey* was on the brief, for appellee.

Before McGOWAN, ROBINSON and WILKEY, *Circuit Judges.*

PER CURIAM: This is an action under §501 of the Labor-Management Reporting and Disclosure Act[1]

[1] 29 U.S.C. § 501 (b) (1964) provides *inter alia:*

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.

brought by the late Joseph A. Yablonski and 48 other members of the United Mine Workers of America against the UMWA and three named officers—Boyle, President; Titler, Vice President; Owens, Secretary-Treasurer—asking for an accounting of UMWA funds disbursed by them and for restitution of funds allegedly misappropriated and misspent.

No trial on the merits has been had. The issue on this appeal is whether the law firm regularly representing the UMWA, who originally entered an appearance for the UMWA and the three individual officer-defendants, should be allowed to continue its representation of the UMWA after it withdrew as counsel for the individual defendants. The District Court found that the regular UMWA outside counsel was not disqualified from continuing its representation in this action, but for reasons enunciated *infra* we hold that in the particular circumstances of this case such representation should be discontinued.

After the action was filed in December 1969, appellant-plaintiffs filed in May 1970 a motion to disqualify counsel on the grounds (1) that the compensation of the regular UMWA counsel would continue to come from the UMWA treasury and (2) that there existed a conflict between the UMWA and the individual defendant officers. A month later the UMWA counsel withdrew as counsel for the individual defendants but remained as counsel for the UMWA, which the District Court sustained as proper.

At the outset of the lawsuit the then counsel for all defendants set about with commendable diligence to delineate the real issues of the lawsuit, filing in behalf of the UMWA and the three individual defendants answers setting forth all customary general defenses, and filing

34 pages of interrogatories to develop more fully the scope of the case.

The appellants argue that this period of six months' prior representation in this same suit disqualifies the regular union outside counsel to continue its representation of the UMWA, even after its withdrawal as counsel for the three individual officer-defendants. With this we do not agree. It has been inferentially held that one lawyer can properly represent all defendants if a suit appears groundless, and that separate counsel is required only in a situation where there is a potential conflict between the interests of the union and those of its officers.[3] We regard the actions of the regular UMWA counsel during its six-month representation of both the union and its officers as an effort to ascertain the exact nature of the lawsuit and protect the interests of all defendants, and by our ruling herein do not imply any censure of counsel's action during this period of joint representation. But there does exist in our judgment a more serious barrier to the continued representation of the UMWA by its regular outside counsel in this particular lawsuit.

I. *Effect of Other Litigation in Which Regular UMWA-Counsel Represent Defendant President Boyle*

Of far more concern is the existence of other litigation in which the regular UMWA counsel is representing Boyle, sometimes in conjunction with representation of the union, at other times not.

(1) The "reinstatement" or "reprisal" case—one of four "election" cases brought by Joseph A. Yablonski against the UMWA and its officers, alleging that the reassignment or severance of plaintiff Yablonski from cer-

[3] *Milone* v. *English*, 113 U.S. App. D.C. 207, 306 F.2d 814 (1962).

tain union duties was a reprisal for his running for president against the incumbent Boyle. After the death of Yablonski the trial court dismissed the case as moot, and this action is on appeal in this court.[3] Appellants here claim that if this court should hold that the trial court was wrong in dismissing the reprisal case as moot, then appellee Boyle may subsequently be required to pay substantial punitive damages to the estate of Yablonski, and thus Boyle has a personal, as distinguished from a union, interest in that appeal. Although initially the union and its officers were represented by the union general counsel in the District Court, the regular UMWA outside counsel represented both the UMWA and Boyle personally on the motion to dismiss as moot; and continues such representation on appeal in this court.

(2) Denial of attorney's fees—as an outgrowth of the UMWA election cases, attorneys for "the Yablonski group" applied for attorney's fees to be paid by the union, which the District Court denied, finding that "no malfeasance on the part of the officers has yet been established." These four cases[4] are now on appeal. The regular UMWA counsel represents both the union and the individual officer-defendants here and did so on the merits in two of the cases in the District Court (the "*Journal*" and "fair election" cases, paragraph 3 *infra*) and on the motions to dismiss in all four cases, where the issue originally was the compliance of the incumbent officers with the Labor-Management Reporting and Disclosure Act. This series of cases is alleged to be related to the case at bar, inasmuch as paragraph 13 of the complaint herein alleges that Boyle and the other individual officer-

[3] Yablonski v. *UMWA*, No. 24,584.

[4] Consolidated cases, all titled Yablonski v. *UMWA*, Nos. 24,560, 24,561, 24,562, and 24,563 in this court.

defendants employed counsel to defend them on charges of breach of trust and paid such counsel from UMWA funds, the regular outside UMWA counsel here involved being one of those whose representation and compensation is being challenged in this present suit.

(3) The "*Journal*" and "fair election" cases—during the UMWA election campaign candidate Yablonski claimed that the union newspaper was being used to promote the candidacy of incumbent President Boyle. On appeals in this court[4] the regular UMWA counsel represented Boyle and the union, although in one aspect in the District Court which was severed and consolidated with the instant case, whether Boyle should be made to pay for some of the costs of printing of the *Journal*, the regular UMWA counsel does not represent Boyle.

4. *Blankenship* v. *Boyle*—a group of retired miners sued the Trustees of the UMWA Welfare and Retirement Fund of 1950, one of the Three Trustees being Boyle, alleging that the Fund had been mismanaged by the Trustees. Boyle was charged with using his position as a Trustee to increase pension benefits to assist his re-election campaign. The District Court ordered his removal as Trustee and this court has recently refused to stay the effectiveness of that order,[5] although not deciding the appeal on the merits. Regular UMWA counsel represents Boyle individually in all three of the capacities

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[4] Appeals in this court in the "*Journal*" cases, all captioned *Yablonski* v. *UMWA*, have now been terminated. In No. 23,439, appellant's motion for summary reversal was denied on 29 August 1969 and the appeal dismissed on 28 April 1970. Nos. 23,536 and 23,659, consolidated on appeal, were affirmed by order of the court on 28 November 1969. The "fair election" case, in which regular UMWA counsel represented the union and its officers in the District Court, was dismissed after UMWA counsel represented that substantial changes in election procedures would be instituted. No appeal has been taken from that dismissal.

[5] *Blankenship* v. *Boyle*, No. 71-1430, Order denying stay filed 11 June 1971.

in which he is sued, as Trustee of the Fund, President of the UMWA, and Director of the National Bank of Washington, as well as representing the union.

We have listed and briefly described the above actions of record in which the regular UMWA counsel represents Boyle individually. Each of these has been minutely examined by appellees' counsel to demonstrate that in no instance is the representation of Boyle individually in conflict with the good faith representation of the UMWA in this case; in effect, that the interests of the UMWA and of Boyle individually are the same. We are assured that if any conflict should arise appellees' counsel would be prompt to withdraw as counsel to the UMWA in this case.

While the issues involved in each of the individual cases, and the past or present existence or nonexistence of any conflict, are relevant to the propriety of the regular UMWA counsel continuing its representation of the union in the case at bar, yet we do not think that this analysis is determinative of the real problem here. It is undeniable that the regular UMWA counsel have undertaken the representation of Boyle individually in many facets of his activities as a UMWA official, as a Trustee of the Fund, as a Director of the Bank owned 74% by the union. With strict fidelity to this client, such counsel could not undertake action on behalf of another client which would undermine his position personally. Yet, in this particular litigation, counsel for the UMWA should be diligent in analyzing objectively the true interests of the UMWA as an institution without being hindered by allegiance to any individual concerned.[7]

[7] "Where, as here, union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by independent counsel, unencumbered by potentially conflicting obligations to any defendant officer." *Int'l Bhd.*

(Footnote continued on next page)

We are not required to accept at this point the charge of the appellants that the "true interest" of the union is aligned with those of the individual appellants here; this may or may not turn out to be the fact. But in the exploration and the determination of the truth or falsity of the charges brought by these individual appellants against the incumbent officers of the union and the union itself as a defendant, the UMWA needs the most objective counsel obtainable. Even if we assume the accuracy of the appellee's position at the present time that there is no visible conflict of interest, yet we cannot be sure that such will not arise in the future.

Whether facts are discovered and legal positions taken which would create such a conflict of interest between the UMWA position and the position of the individual defendant Boyle may well be determined by the approach which counsel for the UMWA takes in this case. We think that the objectives of the Labor-Management Reporting and Disclosure Act[8] would be much better served by

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of Teamsters v. *Hoffa*, 242 F. Supp. 246, 256 (D.D.C. 1965). We are aware, of course, that in a second opinion in the *Hoffa* case, *Int'l Bhd. of Teamsters* v. *Hoffa*, No. 1154-64 D.D.C. 8 September 1965, 52 CCH Lab. Cas. 23,516, the court held that by "independent counsel" it meant counsel who did not represent both the union and an officer-defendant in the same case, and that the union was free to choose a regularly retained attorney to represent its interests in a § 501 suit. The *Hoffa* case, however, did not present a situation like that of the case at bar, where the regular union counsel seeks to represent the union in a "derivative" action while at the same time representing in pending and related matters an individual officer charged in that action.

[8] 29 U.S.C. § 401 (1964) sets forth the congressional declaration of findings, purposes and policy of the LMRDA, including *inter alia* the statement that "in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations. . . ." The legislative history of the Act makes plain that a major congressional objective was to provide union members, as well as the Government in the public interest, with a variety of means to ensure that officials of labor organizations perform their duties in accordance with fiduciary standards. Both the Senate and House reports relating to

(Footnote continued on next page)

having an unquestionably independent new counsel in this particular case. The public interest requires that the validity of appellants' charges against the UMWA management of breach of its fiduciary responsibilities be determined in a context which is as free as possible from the appearance of any potential for conflict of interest in the representation of the union itself.

II. *Objective Determination of the UMWA's Institutional Interest.*

Counsel for the appellees here have stressed the "institutional interest" of the UMWA in all of the issues raised, and particularly the institutional interest of the union in "repose." Counsel's interpretation of the "institutional interest" of the union appears to have been broad enough to authorize UMWA counsel to undertake practically everything worthwhile in the defense of this lawsuit.

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the Act stressed the importance of such standards, the Senate Committee noting that:

> Labor organizations are creations of their members; union funds belong to the members and should be expended only in furtherance of their common interest. A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organization are entitled to a full accounting of all transactions involving their property. (S. Rep. No. 187, 86th Cong., 1st Sess. 8 (1959); *see also* H.R. No. 741, 86th Cong., 1st Sess. 7, 8 (1959).

The House Committee strongly expressed its concern that:

> Some trade unions have acquired bureaucratic tendencies and characteristics. The relationship of the leaders of such unions to their members has in some instances become impersonal and autocratic. In some cases men who have acquired positions of power and responsibility within unions have abused their power and forsaken their responsibilities to the membership and to the public. The power and control of the affairs of a trade union by leaders who abuse their power and forsake their responsibilities inevitably leads to the elimination of efficient, honest and democratic practices within such union, and often results in irresponsible actions which are detrimental to the public interest. (H.R. No. 741, 86th Cong., 1st Sess. 6 (1959).

Appellants' complaint in the instant case alleges a state of affairs existing within the leadership of the UMWA of the magnitude of that which the House Report condemned.

After the withdrawal of the regular union counsel from representation of Boyle individually in this case, the individual practitioner selected to represent Boyle has apparently contributed little to the defense.

By far the strongest laboring oar has been stroked by the regular UMWA counsel on behalf of the union. On oral argument appellees' counsel stated that it had prepared 94 pages of answers to interrogatories, that the individual practitioner representing Boyle had agreed they should do this, as the UMWA had a definite interest that all questions as to the conduct of union affairs previously were accurately answered and that the accurate answers were to be found in the union records. We can see the UMWA interest in having such interrogatories answered accurately, but we would think that since it is the individual defendants who are charged with the misconduct, their counsel would be the one to initiate and to carry the burden. It appears that, since the division of work between the UMWA counsel and counsel for the individual defendants in July 1970, until 15 March 1971 approximately 250 pages of pleadings, motions, memoranda, exhibits, affidavits and papers relating to discovery were filed by the regular UMWA counsel, while the individual defendants' counsel contributed only about 50 pages of similar documents.

In the crucial area of discovery matters, clearly representing the vast bulk of the effort expended by the parties defendant at this stage of the litigation, UMWA counsel have prepared 174 pages of answers to plaintiff's initial interrogatories which were directed to all defendants, while counsel for the individual defendants, until 2 April 1971, some 7½ months after the interrogatories were originally served, had contented himself with filing 2

pages of answers for each individual defendant, a total of 6 pages. On 2 April 1971 counsel finally filed additional answers on behalf of defendant Boyle; however, as of the date of argument of this appeal, answers on behalf of the other individual defendants had not been filed.

Furthermore, we take judicial notice[*] of the fact that subsequent to oral argument of this appeal, the trial court on 2 July 1971 entered Pretrial Order No. 3, which proposed to impose sanctions under F. R. Civ. P. 37 against the individual defendants, if prompt response to the plaintiffs' interrogatories were not forthcoming, and which found that the answers heretofore filed on behalf of defendant Boyle were "in large measure vague, incomplete and unresponsive and bear the indication that no bona fide effort has been made to secure the information necessary to answer the interrogatories."

Aside from the comparative burden of work carried, some of the issues raised by the regular UMWA counsel would seem to be of more interest to the position of the officers than to the union, for example, the defense on the statute of limitations. Granted that the UMWA may have some interest in limiting the exploration of its internal documents, still the overriding interest in the cut-off date from which the officers individually might be liable, if of course they are liable at all, would seem to be that of the individual defendant-officers. Yet the trial court has noted in Pretrial Order No. 3 that "Counsel for defendant Boyle orally adopted at the April 8, 1971 hearing the Statute of Limitations defense proposed and briefed by defendant UMWA but filed no papers in support of such objection."

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[*] *See T.V.T. Corp* v. *Basiliko*, 103 U.S. App. D.C. 181, 183, 257 F.2d 185, 187 (1958).

This points up the difficulty of defining an "institutional interest" such as that of the union. In trying to achieve a valid definition of an institution's interest, it would seem that counsel charged with this responsibility should be as independent as possible. It appears that in 18 months of representation (6 months for both the UMWA and Boyle individually, and 12 months for the UMWA alone), the regular UMWA counsel has not brought forth a single issue on which the UMWA and the Boyle individual interest have diverged.

We think the analogy of the position of a corporation and its individual officers when confronted by a stockholder derivative suit is illuminating here.[10] We believe it is well established that when one group of stockholders brings a derivative suit, with the corporation as the nominal defendant and the individual officers accused of malfeasance of one sort or another, the role of both the corporate house counsel and the regular outside counsel for the corporation becomes usually a passive one. Certainly no corporate counsel purports to represent the individual officers involved, neither in the particular derivative suit nor in other litigation by virtue of which counsel necessarily must create ties of loyalty and confidentiality to the individual officers, which might preclude counsel from the most effective representation of the corporation itself. The corporation has certain definite institutional interests to be protected, and the counsel charged with this responsibility should have ties on a personal basis with neither the dissident stockholders nor the incumbent officeholders.

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[10] *See Phillips* v. *Osborne*, 403 F.2d 826, 831 (9th Cir. 1968); *Int'l Bhd. of Teamsters* v. *Hoffa*, 242 Supp. 246, 251 (D.D.C. 1965). Indeed, as appellees themselves noted in a motion filed in the court below, "The action by Mr. Yablonski and others is a derivative action on behalf of the union. . . ."

Purportedly a stockholder derivative suit is for the benefit of the corporation, even though the corporation is a nominal defendant, just as the appellants here assert (yet to be proved) that their action is for the benefit of the UMWA and that the individual incumbent officers are liable to the union itself for their alleged misdeeds. And, under established corporate law, if the individual officers are successful in the defense of a suit arising out of the performance of their duties as corporate officers, then they may justifiably seek reimbursement from the corporation for the costs of their successful defense.

In the ordinary case the action taken here by the regular UMWA counsel in the District Court might well have been the proper one, *i.e.*, after establishing the nature of the lawsuit by interrogatories and filing answers on behalf of both the union and the individual officers in order fully to protect the position of all parties, then to step aside as counsel for the individual defendants and continue the representation of the union. But this particular case is a derivative action for the benefit of the union, and furthermore must be viewed in its relationship to this entire complex of numerous cases already pending or decided in this and the District Courts in which the regular UMWA counsel has already undertaken the representation of Boyle individually. Each and every one of these cases either directly arises out of or is directly connected with the struggle for power in the UMWA being waged by the Yablonski group on one side and the incumbent officers headed by President Boyle on the other. In this situation, the best interests of the UMWA and the purposes of the Labor-Management Reporting and Disclosure Act will be much better served by the disqualification of the regular union counsel in this particular suit

and its continued representation of the individual Boyle in the other lawsuits.

We are cognizant that any counsel to represent the UMWA selected by President Boyle will be to some degree under his control. But such counsel will still only have one client—the UMWA—to represent in matters growing out of the union's affairs. Such counsel would never be professionally obligated to consider Boyle's personal interests, because they would not be representing him individually in related matters. And the extent of their labors would be gauged by the need to protect the UMWA position in this litigation.

Therefore, the Order of the District Court denying the appellant's motion to disqualify the regular UMWA outside counsel from representing the UMWA in this particular action is vacated, and the cause remanded to the District Court for further proceedings in accordance with this opinion.

No. 24,945 Filed July 21, 1971

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the District Court denying the appellants' motion to disqualify the regular UMWA outside counsel from representing the UMWA in this particular action is hereby vacated, and this case is hereby remanded to the District Court for further proceedings in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:
NATHAN J. PAULSON
Clerk

APPENDIX C

28 USCA 1292. ***Interlocutory decisions***

(a) The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

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(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . .

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28 USCA 1651. ***Writs***

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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29 USCA 501. ***Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void***

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Violation of duties; action by members after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses

(b) When any officer, agent, shop stewart, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section

and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop stewart, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

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